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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF COMMERCE OF PUERTO RICO
AND THE COMMONWEALTH OF PUERTO RICO,
Petitioners,

v.

ARTURO RAMOS VILLANUEVA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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QUESTIONS PRESENTED

I. Whether the Supreme Court of Puerto Rico erred in applying the doctrine of *Branti* v. *Finkel*, 445 U.S. 507 (1980) in the case at bar, in view of sec. 5.10 of Puerto Rico's Public Service Personnel Act, (3 LPRA 1350) [1] and in so doing; (1) invalidated a state statute on federal grounds (2) incorrectly adjudged a federal right, causing serious hinderance to the effective administration of said statute (3) improperly interpreted, applied or extended this Honorable Supreme Court decision.

II. Whether, in adopting the trial court's findings of facts the judgment of the Supreme Court of Puerto Rico is patently erroneous in relation to the evidence presented and, in so doing, grossly misapplied the doctrine of *Branti* v. *Finkel*, [2] supra.

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[1] See Appendix F, p. 34a.

[2] All parties to the proceedings from the Supreme Court of Puerto Rico, from whose judgment review is sought are included in the caption of the case before this Court.

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OPINIONS BELOW

The Opinions of the Supreme Court of Puerto Rico are not yet reported but appear in the appendix (Appendix A pp. 1a-18a) The Opinion of the Superior Court of Puerto Rico, Aguadilla, Region, not reported, appears in the appendix (Appendix B, pp. 19a-24a)

JURISDICTION

The judgment of the Supreme Court of Puerto Rico was entered on March 31, 1982. A timely petition for rehearing was denied by Order on May 13, 1982 (Appendix C p. 25a).

This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the Constitution of the United States which provides:

> "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment of the Constitution of the United States (Appendix D p. 26a)

3 L.P.R.A. sec. 648 (1965) (Appendix E pp. 28a-33a).

3 L.P.R.A. sec. 1350 (1978) (Appendix F p. 34a).

3 L.P.R.A. sec. 1421 (1978) (Appendix G pp. 35a-37a).

STATEMENT OF THE CASE

A. Trial Stage

Arturo Ramos Villanueva began to work in the Department of Commerce on July 10, 1973. He held the position of Regional Director of the Department of Commerce in Aguadilla. Said position was in the Non-Competitive Service by virtue of Public Law Number 345 of May 12, 1947, as amended (3 L.P.R.A. 648, (1965) See Appendix E pp. 28a-33a).

On February 7, 1977 Honorable Juan Cintron, Secretary of Commerce of Puerto Rico, sent a letter to Ramos Villanueva dismissing him from his position (Classified as Non-Competitive, according to Public Law Number 345, supra, and as position of Trust according to the New Personnel Act Public Law Number 5 of October 14, 1975, (3 L.P.R.R.A. sec. 1350, (1978) Appendix F. p. 34a).

On February 28, 1977 Arturo Ramos Villanueva filed a complaint against the Secretary of Commerce and the Commonwealth of Puerto Rico alleging that his removal constituted an arbitrary action, with clearly political motivations only be-

cause plaintiff was an active member of the Popular Democratic Party, and requesting the Aguadilla Division of the Superior Court of Puerto Rico, to reinstate him in his position.

After a hearing was held and Memoranda was submitted by both parties the Trial Court on January 22, 1981 rendered Judgment finding that Ramos Villanueva's dismissal was mainly due to his political affiliation. It then applied the rule laid down by this Honorable Court in *Branti* v. *Finkel*, supra, and concluded that there was a First Amendment violation and, thus, the dismissal was null. (Appendix B p. 19a).

The Trial Court's finding of facts revealed the following:

Ramos Villanueva was appointed Regional Director of the Department of Commerce for the Aguadilla Region. In such capacity his duties were mainly of an executive nature, including among others:

> (a) to advise the Under-Secretary of the Domestic Commerce Program in matters related to the education and training of commerce personnel; (b) to plan, direct, supervise, and evaluate all technical and administrative activities related to commerce development programs in the region; (c) to establish working methods that facilitate the achievement of the program's goals; (d) to coordinate with other agencies; (e) to advise the Under-Secretary of the Domestic Commerce Program in its activities for the region (Appendix B p. 19a)

It was also indicated in the Trial Courts judgment (Appendix B p. 20a) that the position of Regional Director of Aguadilla was originally created in the Competitive Service but was transferred to the Non-Competitive Service in June, 1973, by request of the Secretary of Commerce. This was so because the Secretary of Commerce needed that the incumbent of said position be a person enjoying his confidence since such a person would need to work with a fair amount of independence and make decisions on his own initiative so as to carry on the program of the agency. The incumbent would also be the person who would represent him officially in all the official acts in the Aguadilla region. (Appendix B p. 20a)

It was determined that in his capacity as Regional Director the plaintiff was responsible for implementing the various departmental programs in the region, adopting those measures and regulations necessary to such effect. In addition, it was determined that the plaintiff was the representative of the Secretary of Commerce in the region with the power to enforce those policies adopted at central departmental level. (Appendix B p. 19a)

When the new Personnel Act of 1975, supra, was approved, the position occupied by Ramos Villanueva was again included as a position of trust in the Department. Such classification was accepted by the Office of Personnel through a September, 1976, Memorandum to the Secretary of Commerce making the corresponding reassignment of the position from one in the Non-Competitive Service to a Position of Trust, effective the first day of October, 1976.

Following a change in the government administration Ramos Villanueva received a letter dated February 3, 1977, notifying of a dismissal from a position essentially confidential. (Appendix B p. 20a)

The trial court found that plaintiff's dismissal was due to his political affiliation and concluded that there was no evidence whatsoever as to establish that the plaintiff was not a person with the capacity and ability needed to discharge the position he used to occupy. The Trial Court also indicated that there was no proof whatsoever showing that Ramos Villanueva's affiliation, different from the party in power, created or could create problems of any kind in the implementation of government programs in that Department. To support this conclusion the trial court indicated that the Agency's Director of Personnel, Ana Julia Fernandez, stated that she had no knowledge that the political affiliation of the incumbent in the position had any impact whatsoever or in way was essential to the development of the agency's programs. (Appendix B p. 21a)

The Court also decided that defendant's (Secretary of Commerce) own evidence showed that the position of Regional Director for the Regions of Guayama and Fajardo were classi-

fied within the Career Service, and that this situation did not create any problems whatsoever in the development of the programs of the Department for those regions. Thus, the Trial Court concluded that the classification of the position of Regional Director of the Aguadilla Region as a position of trust is due to a functional and administrative convenience of the Department rather than to an imperative need in matters of absolute freedom necessary in the selection of the incumbent for the position and thus applied the doctrine of *Branti* v. *Finkel*.[3] (Appendix B pp. 22a)

B. Initiation Of Petition For Review

On April 3, 1981 the Secretary of Commerce of Puerto Rico initiated a Petition for Review to the Honorable Supreme Court of Puerto Rico contending that the trial court erred in issuing finding of facts openly in conflict with the evidence presented; declaring valid the complaint, in open contradiction with the Personnel Act and legal doctrines prevailing in Puerto Rico, and erroneously applying to the facts of the case the doctrine set forth in *Branti* v. *Finkel*, supra.

On March 31, 1982 the Supreme Court of Puerto Rico denied the Petition for Review and issued an Opinion and Judgment. In summary, the Supreme Court of Puerto Rico believes that the factual circumstances of the case revealed a dismissal for political motives and thus, the First Ammend came into play applying the doctrine of *Branti* v. *Finkel*, supra. The Supreme Court of Puerto Rico concluded that the appointing authority failed to present "evidence to show that the employee's particular political affiliation is an 'appropriate' requirements for the effective discharge of the public office in question. . ." (Appendix A p. 1a)

On April 30, 1982 the Secretary of Commerce filed a timely Motion of Rehearing, essentially arguing the existence of man-

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[3] This findings of facts, which are patently erroneous, will be discussed later on.

ifest error in the finding of facts by the Supreme Court of Puerto Rico in view of the evidence presented. This Motion was denied on May 13, 1982. (Appendix C p. 25a)

C. How The Federal Question Was Raised

Plaintiff Ramos Villanueva alleged in his complaint that his dismissal was an arbitrary one, with clear political motivations, without due process, and in violation of the constitutional principles that forbid political discrimination. The Trial Court decided that the dismissal was due to political affiliation and applied the case of *Branti* v. *Finkel*, supra, where the First and Fourteenth Amendment of the Constitution of the United States are brought into play. The Honorable Supreme Court of Puerto Rico issued an Opinion and Judgment whereby it concludes that the dismissal is null in view of Brenti v. Finkel, supra, and the First Amendment rights. (Appendix A pp. 1a-18a)

REASONS FOR GRANTING WRIT OF CERTIORARI

1. The peculiar and improper interpretation made by the Honorable Supreme Court of Puerto Rico of *Branti* v. *Finkel*, supra, results in the abrogation of sec. 5.10 of the Puerto Rico Public Personnel Act, thus invalidating a state statute on federal grounds.
2. The Decision of the Honorable Supreme Court of Puerto Rico deprives the Government of Puerto Rico of having the public service personnel needed to implement the public policy which the electorate favored at the polls.

Ramos Villanueva was appointed Regional Director in the Department of Commerce under the provisions of the Personnel Act Number 345, supra. Said Law divided the positions in three (3) groups or subdivisions: (1) Exempted Service, (2) Non-Competitive Service, and (3) Competitive Service. (Appendix E p. 28a-33a)

His position was included in the Non-Competitive Service under the previous Personnel Act in accordance with Article 8(b) (2) which included the positions of "no more than fifteen

(15) officials and/or employees of each agency whose functions are of the normative, specialized, advisory, or trust type." (3 LPRA sec. 648 (b)(2), Appendix E p. 31a)

In accordance with the new Public Service Personnel Act, Public Law Number 5, supra, only two categories of employees are recognized: career service and confidential or trust category.

The plaintiff at the time of his appointment held a position in the Non-Competitive Service which was unaltered in consonance with Article 9 of the new Personnel Act (3 LPRA sec. 1421, Appendix G pp. 35a-37a) and was thus, at the time of dismissal classified as a confidential employee.

This last type is defined as ". . . employees . . . that intervene or collaborate substantially in the formulations of public policy, who advise directly or render direct services to the head of the agency . . ." and expressly includes regionals directors of agencies within the confidential service, providing that said positions of trust, or confidentials employees shall be freely selected and removed. (Sec. 5.10, (3 L.P.R.A., sec. 1350, Appendix E pp. 28a-33a)

This section of the law specifically creates a category of employees whose type of work, in order to be effectively discharge, require that the incumbent be of a particular party affiliation. Said classification, therefore, implies that the incumbent occupies said position at the will of the appointing authority.

Section 5.10 of Public Act Number 5 supra, thus implies a priori the condition that such confidential employee must belong to the same party as the appointing authority in order to function effectively. Thus the nature of the confidential employee inevitably excludes political non-conformity.

To that effect the Honorable Supreme Court of Puerto Rico in the case of *T. D. Pierson Muller II* v. *Feijoo* stated:

> "The reason why our legislation on public service personnel has acknowledged the existence and the need for

confidential personnel 'of free selection and removal; can be found in the essential selective nature of a government system which has the responsibilty of carrying out programs, normative plans, and the public policy that has won the majority's approval in the ballots . . .

[5]The changes in the administration supervened after the General Elections shall necessarily affect those positions whose holders implement public policy, or perform normative or confidential functions, inasmuch as they cannot mediatize the will of the people expressed in the ballots in favor of certain government programs and electing new administrators. The Constitution of the Commonwealth cannot tolerate any obstacle to the legal exercise of the power that stems from the people's sovereignty. In its Preamble, it declares that the will of the people is the source of public power; this principle is reiterated in Art. I, Sec. 1, stating that political power of the State emanates from the people and shall be exercised in accordance with their will; and in Sec. 2, stating that the Legislative, Executive and Judicial powers are subordinated to the sovereignty of the people; and affirming the value and effectiveness of the vote in Sec. 2 of the Bill of Rights (Const. Art. I, Sec. 2) when it provides that: 'The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise.

[6-7] Electoral franchise would be meaningless if the men elected to govern were not able to give effectiveness to the vote casted. The popularity acquired by this fundamental principle of the democratic regime is an excellent reminder for the so-called confidential employees that the vote's effective value precludes them from the expectation of continuity and from all possible property interest in such sensitive positions. Individual aspiration are transcended by the supreme action of the democratic assertion, circumstance which becomes manifest in the Report of the Commission on the Bill of Rights of the Constitution Convention, subscribed by its President, . . .[4] Appendix H p. 43a, 44a-45a)

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[4] It is curious to note that the decision of the Honorable Supreme Court of Puerto Rico, in the case at bar, creates an anomalous

Finally, it is inevitable for us to echo the expressions issued by Honorable Associate Justice Diaz Cruz in his Dissident Opinion, which summarizes our position, when he states:

> "The head or administrator of the government agency has the mission and duty of carrying out a program and of enforcing a public policy in the most efficient manner. His immediate aides must be identified with this public undertaking because they are responsible of the normative orientation of the same; that is why they must be subject to free selection and removal by the head of the agency. The duration of their employment is determined by the confidence the head of the agency has on their fitness and loyalty to carry out the governmental task. The confidential employee cannot raise his freedom of speech or of belief in order to retain his position as a dissenter because this would weaken the State's overriding interest in that the men called upon to govern may channel its program with utmost efficacy. If in the opinion of the Head of the Department the confidential employee's political affiliation places him on a plane of ideological incompatibility with the rules and purposes of the administrator, the latter shall always be completely free to do without his services. If the Head must answer to the People for his administrative undertaking, part of his commitment is to prevent that ideological dissenters hold-

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situation in the administration of personnel in public service, since the doctrine established is contrary to the one prevalent up to that time, as regards the area indicated. Its practical effect is that officials appointed to positions of trust, who belonged to a political ideology different from that of the incoming Administration, are placed in an advantageous position in relation to those also in positions of trust—who are politically allied to the new government. The former could remain in their positions unless it is shown that the matter of their political affiliation is an appropriate and necessary factor for the performance of their functions. The latter would always be subject to the appointing authority's absolute discretion, since they cannot invoke the political discrimination element available to the former group.

ing sensitive decision-making positions obstruct or defeat the same. Generally, ideas on government plans and programs form the contents of the person's political affiliation, specially within the partisan tradition of the democratic regime; that is why the license conferred by the overriding public interest in confidential employee matters cannot be restricted by the individual's protection against discrimination provided by our Constitution. . . . The majority has engendered a mistaken concept of the merit principle, a government or administration institution whose service is shunned by the best ones, and that if it attracts some of the ill-informed, they shall find themselves heading an agency with an unremovable confidential personnel. The new administration's absolute impossibility of operating with agency heads and other high ranking confidential personnel, affiliated to the adversary, defeated in the elections, is a widely known and notorious fact which can be plainly seen right now in our political panorama. The overriding public interest in the organization of government and in efficient administration is patent in our milieu: *we need no witnesses to prove it; neither Branti* v. *Finkel, nor the First Amendment lead to this devastating result; nor would the Federal Supreme Court place an employee's stubborness over the value and efficacy of suffrage.*" (Emphasis supplied) (Appendix A pp. 13a, 15a)

Lastly, it must be pointed out that in our American Democratic system the Executive and Legislative powers are derived from the political mandate given at the ballot box every four (4) years, through the electoral mechanism process, and according to the political thinkers they are the political powers of the State. It is inherent to the Executive power to be able to count on having various positions of trust, trust in the sense of being politically trustworthy. The Executive power is the one that has to determine those positions within each Government Department which shall be classified as strictly positions of trust, precisely because of their inherent functions of assistance to the Department heads and the Governor in the formulation of public policy, counseling and planning. *The text of the actual Personnel Act specifically includes as positions of trust the Regional Directors of the agencies (3 L.P.R. A1350*

(4) (Emphasis ours). It must be remembered that the Puerto Rican Legislature precisely through the Personnel Act in effect, as well as in the previous Personnel Act, supra, left it to the discretion of the Executive Branch the determination of which twenty-five positions under the present Act, and fifteen positions of trust should be in each Department or Agency of the Commonwealth of Puerto Rico.[5]

Previously, the Commonwealth Judicial power, regarding another Department of equal rank as the Department of Commerce, determined, on the contrary, that Regional Directors are indeed positions of political trust employees (*Diaz Gonzalez* v. *Tribunal Superior*, not reported, Appendix I pp. 48a-68a)

The effect of the final decision of the Honorable Supreme Court of Puerto Rico in this case would be that of circumscribing the positions of trust in the Department only and exclusively to the level of the Office of the Secretary of each Department. This would practically nullify our Personnel Administration legislation now in effect in all of the Commonwealth of Puerto Rico. It behooves to reiterate that the legislation has been validated precisely by our Honorable Supreme Court, through several of its own decisions which have been already discussed.

3. The Supreme Court of Puerto Rico improperly applied the doctrine set forth in *Branti* v. *Finkel*, supra.

This Honorable Court, in the above cited case, found that respondents *Branti* v. *Finkel* as assistants public defenders had " 'very limited, if any, responsibility' with respect to the overall operation of the public defender's office. They did not

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[5] It must be noted that the Honorable Supreme Court of Puerto Rico in its Opinion and Judgment, Appendix A pp. 1a-7a does not declare the referred statute unconstitutional nor determines that the Executive Power exercise an abuse of discretion in the application of said statute.

'act as advisors or formulate plans for the implementation of the broad goals of the office' and, although they made decisions in the context of specific cases, 'they do not make decisions about the orientation and operation of the office in which they work.' 457 F. Supp. at 1291. . . . they did not occupy any confidential relationship to the policy making process and did not have access to confidential documents that influenced policymaking deliberations. Rather the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy." (48 L.W. 4332)

In the light of those factual findings this Honorable Court found that this employees were neither policymaking nor confidential and thus, their political affiliation did not interfere with their discharge of public responsibilities, so that their rights under the First Amendment did not yield in the face of the interest of the state in maintaining governmental efficiency and effectiveness.

The case proceeds to offer three factors to be considered in the determination of whether an incumbent of a public office is or is not protected against political discrimination. First a determination has to be made as to who does that public official primarily answers to. Is his responsibility towards the Government? Is it towards the public in general? Is he expected to act with independence of criteria or trace some standards of the appointing authority? The second factor is the source wherefrom the confidentialty of his work originates. Does it originate in the ordinary course of his work or is said confidentiality accessible to him via the appointing authority? As a third factor the question is: Is he or he is not implementing the political platform of a political-partisan group?

Thus, in conformance with the doctrine set forth in the case of *Branti* v. *Finkel*, supra, the particular facts of each case must be taken into consideration in order to determine

whether the constitutional protections of the First and Fourteenth Amendment protect an employee against political discrimination.

In the case at bar the basis expressed by the then Secretary of Commerce, Mr. Damian Folch, for changing the position of the plaintiff to the Non-Competitive Service turns out to be of particular interest for the case at hand. To such effect, the Secretary alleged that the incumbent of the same should be a person enjoying his entire confidence, since he would have to make decisions on his own initiative for the purpose of implementing and giving continuity to the mission that he, as Secretary, had been given by the Government in power; and that in addition, he would represent him as Secretary of Commerce. (Appendix J p. 69a-70a).

It should also be noted, that in conformance with the finding of facts adopted by the Supreme Court of Puerto Rico in its Opinion, Mr. Ramos Villanueva had within his duties and responsibilities that of advising the Assistant Secretary of Commerce, the implementation of public policy of said Department in the Aguadilla Region, ascertaining that the objectives of the Department of Commerce were met in that Region, determining the personnel needs of said Department, and the representation of the Commerce Program in said Region (Appendix A pp. 1a-18a)

Therefore, the functions to be performed by the Regional Director of Aguadilla are clearly ones of the Normative, Specialized, Advisory, and Position of Trust type.

Also noteworthy, is the fact that the Trust Plan approved by the Personnel Office of Puerto Rico under the previous administration, as well as in the one finally approved by the present Director of said office, made all the Regional Directors of the Department of Commerce positions of trust.

We hold that there was evidence to the effect that the political affiliation of the plaintiff was an appropriate requirement for the effective discharge of the public office involved.

As first factor a determination has to be made as to whom Mr. Ramos Villanueva answered. According to the facts of the case at bar, the incumbent in the position of Director of a Regional Office was a person enjoying the full confidence of the Secretary, since he constituted the "Alter Ego" of the Secretary in a particular Region. Said official was expected to trace the norms implemented by the Secretary.

To such effect, the Honorable Supreme Court of Puerto Rico in an expressed and categorical manner has indicated that the Regional Directors as sub-heads of the Department constitute the "Alter-Ego" of the Secretaries in each region of the country, due to its policy-making and trust nature and that they are under the discretion and whim of the appointing authority in their selection or dismissal. *Diaz Gonzalez* v. *The Superior Court*, supra, and finally asserts that:

> "It should be clear that policy-making officers of the executive and of the majority in the legislature should have, when considering the problem of the country, a government philosophy, and attitudes consistent with—and not contrary to—those of the government elected by the people and under which they serve." (Appendix I p. 54a)

As a second factor to be considered, it is important to determine what is the source of the confidentiality of the work that plaintiff performed as Regional Director. His functions included advising and implementing the public policy of the Department, the coordination of activities with other governmental agencies, and the representation of said program by express delegation. With this in mind it must be categorically concluded that it was through the appointing authority, the Secretary of Commerce, that the confidentiality of work plaintiff performs was nurtured. (Appendix B p. 19a)

As a third factor, one has to consider whether Regional Directors contribute to the implementation of the political platform of a political group. There is no doubt that being said official the sub-heads of a Department, they would enervate the efficiency and the effectiveness of a Government, in the

implementation of the political platform, that by means of the mandate of the people, it was constitutionally elected to carry it out.

The letter of Mr. Damian Folch, Secretary of Commerce, under the Popular Democratic Party to which the plaintiff belongs, gave the reasons which cause the change of said Position to one of Trust consigning once again the character of confidentiality of said office. (Appendix J p. 69a-70a)

It seems unavoidable to conclude, in conformance with the preceding analysis, that the political affiliation of a Regional Director is an appropriate requirement for the effective discharge of the public office involved. As a consequence, the incumbent of said public office is not protected against political discrimination under the provisions of Amendments I and XIV of the Constitution of the United States.

The political affiliation, as a defining ingredient of the trust position, has been sanctioned by the First Circuit Court of Appeals in a case originated in the Federal District Court of Puerto Rico. In *Alfaro de Quevedo* v. *de Jesus Schuck*, 556 F.2d 591 (1977), said Court of Appeals held that said criterion can be validly used in the appointment and dismissal of officials who intervene in the formulation of public policy; even though the office the plaintiff headed is a third level one in the organization's hierarchy. It involved the Criminal Justice Division of the Department of Justice.[6] It is important to observe

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[6] This Division gave advice to the Secretary of Justice, the Under Secretary and the Assistant Secretary of Justice concerning substantive and procedural penal law. Besides the aforementioned, it was in charge of analysing all the proposed bills submitted by legislators related to penal matters; the preparation of bills at the request of the Governor (through the Secretary) or the Secretary of Justice, with regard to criminal justice; and of continuously carrying out specialized studies in this field.

that said work unit does not compare with the position of Regional Directors of a Department who has in a representative capacity of the head of the agency or who is the "*alter ego*" of such an Agency head.

Notwithstanding the aforementioned, said Federal forum categorically expressed on page 592, and quoting *Elrod* v. *Burns*, 427 U.S. 347 (1976):

> " '*Even so, policy-makers may be dismissed, consistently with the Constitution, on partisans grounds. This is not because policy-makers lack first amendment rights. Rather, it is because the first amendment interests in such cases are outweighed by 'the need for political loyalty of employees* . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate'. (Emphasis supplied)
>
> On the other hand, a new administration should not be forced to rely on admirers of opposing political views."

Upon ruling against the pretensions of the plaintiff, the Court of Appeals concludes by saying:

> "The Secretary was entitled to a person in plaintiff's position *who would enthusiastically pursue the policies of new administration.*" (Emphasis supplied)

IV—The decision of the Supreme Court of Puerto Rico is patently erroneous since its finding of facts are openly in conflicts with the evidence presented and thus, misapplies the case of *Branti* v. *Finkel*.

The Supreme Court of Puerto Rico found that the factual circumstances of the case at bar revealed a dismissal for political motives and it applied the doctrine of *Branti* v. *Finkel* supra. It concluded that the appointing authority failed to present "any proof showing" that the political affiliation of Ramos Villanueva was the appropriate requirement for the effective discharge of the position of Regional Director (Appendix A p. 2a-3a).

There are two theories on which the Honorable Supreme Court of Puerto Rico relies in order to arrive at the referred conclusion.

In the first place it indicates that the record shows that the hiring authority did not bring any evidence to demonstrate that the political affiliation of Ramos Villanueva was an appropriate requirement for the effective discharge of such office, but on the contrary, the Agency's Personnel Director stated that she "did not know that the incumbent's political affiliation had any impact whatsoever or was in any way essential for the development of the agency's programs." In that way, the Honorable Supreme Court of Puerto Rico adopted as its own finding of fact, of the Judgment rendered by the Trial Court which, is openly in conflict with the evidence presented. (Appendix A pp. 1a-6a).

Documentary evidence, other findings of facts, as well as a careful look into the transcript of the testimony of Mrs. Ana Julia Fernandez completely lessens the value of the above statement and reveals the essentially confidential nature of Villanueva's position.

Excerpt from pages 79a-80a, 81a, 82a-83a of Ana Julia Fernandez's testimony read as follows: (Appendix K)

"ALDARONDO, ESQ.:

Q. How many Regional Directors does the Department of Commerce have?

A. There are nine Regional Directors.

Q. As Personnel Officer, under what services are the Regional Directors on the Department of Commerce included?

A. They are included the nine of them, the nine positions are included within the confidential service.

Q. Why are said positions within the confidential service?

A. Beause the contention is that the Regional Directors *represent the Secretary of Commerce in each one of the regions. They end up being like mini Secretaries of Commerce in each region.* And . . . in addition to that, well, *they are the persons that have the responsibility of implementing the public policy of the De-*

partment of Commerce in relation to the services rendered to the business community. (Emphasis supplied)

. . .

Q. In what way is it represented, you testified a few moments ago that the Regional Directors were secretaries, in what way, if any, is it that they delegate that representation responsibility of the Secretary in their person?

A. Well, in the instrumentation of public policy and in the services to be rendered to the commercial and industrial sectors in terms of direct service.

Q. Based on your experience in the personnel area, could you tell us if for the position of Regional Director there is a need for a person of similar political affiliation to that of the Secretary of the Department of Commerce and why?

A. I believe that if a Regional Director, based on the practice, should indeed have *the same political affiliation as the Secretary of Commerce because he is the person that in thinking has to be compatible in terms of the implementation of public policy.* He represents the Secretary of Commerce in his region, who on occasions *has to assume the representation of the Governor."* (Emphasis supplied)

Mrs. Fernandez reiterates her position, when being questioned by the lawyer of Ramos Villanueva, she points out on page 117a:

Q. Uh, you stated Mrs. Fernandez that even though you deal with personnel, that you believe, that in your opinion these nine positions should have also been from the same party as the Secretary of Commerce, of the same political party because he is the one who represents him over here?

A. That is a, that is a very personal interpretation of mine.

Likewise, she sustains her position when on pages 119-120a she points out to the Trial Judge:

Q. "Very well, madam, I have some small doubts and since I am the one to settle this at the end, you will excuse me for asking a couple of questions, the first is the following: you stated that the day . . . something of November, November 30th, '76 the Act came into effect, according to your interpretation, the Act entered in 'propio vigore' classified the employees, the new classification establishes career and confidential, you state that in your opinion the Regional Directors should be of the same political affiliation as the head of the Department.

A. They should be."

The above quotations weaken, without doubt, the finding of facts object of this discussion.

Besides it is our contention that there was a lot more than any evidence where there arises that the political affiliation of the incumbent of that position was an indispensable requirement for that particular position.

The Trial Court in its own findings of fact revealed the essential nature of the trust position of the appellee. It indicated that the Ramos Villanueva, as Regional Director, was responsible for enforcing the various departmental programs through the adoption of the necessary interagency measures and regulations. That he was the representative of the Secretary of Commerce in the Aguadilla region and had the authority to enforce the policy of the Department. That in his capacity as Regional Director, the plaintiff exercised eminently executive functions. (Appendix B, p. 19a)

In addition, plaintiffs' position was, since the beginning, included within the Non-Competitive Service in tune with sec. 8(b)(2) of the Old Personnel Act, supra. (Appendix E, pp. 31a-32a)

No less important to the previous evidence is the letter sent by the Former Secretary of Commerce, Mr. Folch, to Milagros Guzman, Director of the Office of Personnel, which insofar as pertinente reads:

"As of that same date, I will include in the Non-Competitive Service position No. 236 of the Executive Director I assigned to the Aguadilla Regional Office. This position, whose functional title is Regional Director, was created on July 1, 1972 and since then, it has remained in the Competitive Service. This action is based on the fact that the incumbent to be appointed in said position must be within my confidence as Secretary of Commerce. Due partly to its geographic position, the Aguadilla Regional Office must have certain independence, since the Regional Director will have to make decisions on his own initiative in order to implement and to give follow-up to the mandate we have been given by law. In his capacity, he represents me as Secretary of Commerce, while he also represents our Government." (Appendix J, pp. A-74)

Nevertheless, the Supreme Court of Puerto Rico understood that the appellants gave inordinate value to such letter. (Appendix A, 69a-70a)

In our judgment, in no way, has there been an attempt to give a disproportionate value to the referred document. This document is explicit and clear and should be given its fair evidential value, particularly, when it is seen together with the documentary and attesting evidence supplied.

The Supreme Court of Puerto Rico understands that from the content of the same it can be gathered the person occupying the position should have the Secretary's confidence; and that he would have to make decisions on his own initiative, in order to implement the Law; (Appendix A, pp. 3a-4a).

It is thus evident that said document contributes evidence in favor of the State thesis that the political affiliation of the employee was a fundamental requirement for the adequate discharge of the functions of the position in question.

The statement made by Mr. Folch, in the above mentioned letter, referring to "our Government" make us inevitably infer that the position requires a person having the same ideology as that of the Government in power, so that the popular will can be enforced, making it possible to carry out the Government program which the electorate favored through its right to vote.

Again, it is imperative to recall the case of *Diaz Gonzalez* v. *The Superior Court*, supra. (Appendix I, p. 52a) where the Honorable Supreme Court of Puerto Rico expressed in a categoric manner that Regional Directors are the "alter-ego" of the Heads of the Departments and as such they are stricly confidential.

The second theory on which the Supreme Court of Puerto Rico relies is that the testimony of Ana Julia Fernandez[7] was corroborated by the evidence brought by the government in the sense that analogous offices—those of Guayama and Fajardo regional directors—are classified within the *career service* and that situation has not caused any problems whatsoever in the development of the Department's programs . . ." (Appendix A, p. 3a).

Again, this conclusion disregards the evidence presented.

If it is true indeed that from the testimony of Mrs. Fernandez it can be gathered that there were two Regional Director positions, to mention: the one at Fajardo and the one at Guayama, whose incumbents were within the Competitive Service; it is no less true, that the explanation for said situation was detailed and satisfactory, besides being supported by documentary evidence.

Mrs. Ana Julia Fernandez indicated, in what is pertinent, in pages 121a-123a (Appendix K).

> "A. When the first regions were created well it was San Juan, Ponce, Mayaguez and the last regions created were, the Guayama one and the Fajardo one and perhaps the one in Aguadilla also. When the creation of the position of Regional Director for Guayama and Fajardo was requested, it was explained to the Central Personnel Office, that it was a Regional Director and that he had the functions of the position, they had characteristics of confidential positions trust;

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[7] Testimony that does not adjust itself to the evidence.

but at that time *the previous Personnel Act was in effect, permitting only fifteen positions in the Non-Competitive Service* by virtue of Section 8-B2 of the old Personnel Act. At the time when the creation of the last two positions of Regional Director is requested, *the Department of Commerce had filled the fifteen positions in the Non-Competitive Service:* that is, the Central Personnel Office did not wish to create a position number sixteen and a position number seventeen in the Non-Competitive Service because it would have been a violation of the Act; and they then created it in the Competitive Service, a position clearly with characteristics of a confidential position, but in the Competitive Service.

Q. That is, that upon creating the Fajardo and Guayama regions there were fifteen confidential positions?

A. The positions had already been filled. That is the same thing that happens with the position for Aguadilla, that were created in the Competitive Service also.

Q. Then that raises another doubt in me, that is, then the Regional Directors of those two regions were less Regional Directors than the others, that is, they did not have the same representation of the Secretary and did not have the same powers?

A. They had the same functions.

Q. Very well. Then the other question. I understood from your testimony and according to what has been quoted, that the Act itself provides that all Regional Directors are confidential positions?

A. Yes, sir.

Q. Upon creating those two positions in the Competitive Service isn't there something then that. . .

A. Those positions are created in the Competitive Service prior to the new Act, those positions were created before '72.

Q. What is the Act that provides that all . . . before '75; that is, what is the Act that provides that all the division heads.

A. It is Act No. 5 of 1975, the new Personnel Act.

Q. Act No. 5 of '75, October?

A. Yes.

Q. The division heads no, the Regional Directors?

A. The Regional Directors. At the moment that those positions of Regional Directors are created, it was understood that they were confidential positions, what happens is that the Act did not provide a mechanism to include it in the Confidential Service because of the existing limitation that did not allow more than fifteen positions.

Q. That is, and at the date of that Act already the Guayama and Fajardo positions existed?

A. Yes, sir. . . ."

Summarizing, the witness explained that due to the fact that under provisions of Law 345, supra, only fifteen positions were allowed to be included in the Non-Competitive Service, the positions of Directors for these Regions had not been able to be included within the positions of trust existing in the Department of Commerce.

This is corroborated by a letter sent to Milagros Guzman, Director of Personnel from Secretary Damian Folch (Appendix J, pp. 69a-70a), where there arises that due to a resignation tendered in one of the positions included in the Non-Competitive Service under section 8(b)(2), supra, the position of Executive Director I assigned to the Aguadilla Regional Office (in this case the position that the appellee was going to occupy) was included in the Non-Competitive Service.

Now then, the witness immediately continued to explain that upon entering into effect the new Personnel Act and in conformance with Article 9 of said Law, supra, the official occupying said positions, the Regional Director for Guayama and Fajardo although they kept their career employees'

status,[8] their positions were converted into positions of trust and so they were removed to a position in the career service.

On the other hand, it is important to note that under the New Personnel Act the positons of trust which the Department of Commerce would be entitled to, would be twenty-five (25) and that is the reason why then all Regional Directors could be included in a confidential position.

We understand that the explanation given by the witness, in addition to the documentary evidence offered, clearly established the reasons why said incumbents belonged to the career service, even though their functions and duties were those of a position of trust.

The Supreme Court of Puerto Rico assumed that if these two employees, who were in the Competitive Service did not cause any problems in the development of the Department programs it could be concluded that the office of Regional Director did not require the incumbent to be a person having the confidence of the appointing authority. (Appendix A, p. 3a)

It arises from the testimony of Ana Julia Fernandez that the positions of Regional Directors were created in 1972, when the Popular Democratic Party was in power. From the documentary evidence there arises that the Regional Directors of Guayama and Fajardo were appointed prior to the elections of 1976. The appointing authority had to fill those positions, no positions in the Non-Competitive Service were available and thus fills them with persons of his confidence, but in the only position available the Competitive Service. The same appointing authority, upon entering into effect the New Personnel

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[8] It must be noted that said positions were positions in the Competitive Service and thus, when the New Personnel Act enters into effect its incumbents were considered career employees. (Art. 9, supra) (Appendix G, pp. 35a-37a).

Act, supra, makes this position one of trust, benefitting from the fact that the law now authorized twenty-five (25) positions of trust.

At the onset of the electoral change in 1976 the Regional Directors of Fajardo and Guayama under the Popular Democratic Party government were installed in other positions. Their position's once vacant became trust positions by virture of Art. 9, supra, and their incumbents enjoyed the confidence of the new appointing authority, the present Secretary of Commerce, Honorable Juan H. Cintron.

We do not see any reason why the Regional Directors of the positions for Guayama and Fajardo could have caused any problems during the time they enjoyed their positions as Regional Directors, since they did so during a period of time in which they enjoyed the confidence of the then appointing authority. When said authority changed they, enjoying a career employee status, were reinstalled in other positions having their positions as Regional Directors vacant for the new appointing authority.

CONCLUSION

For these reasons: 1) a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the Commonwealth of Puerto Rico and 2) the Opinion and Judgment of the Supreme Court of the Commonwealth of Puerto Rico in this case should be revoked or reversed by the Supreme Court of the United States of America.

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